IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BETTY LEUNG and KEVIN LEUNG	**|**	**CIVIL ACTION**
	|	**NO. 98-3337**
v.	**|**	
	|	
SHK MANAGEMENT, INC. t/a	**|**	
KORMAN COMMUNITIES, INC.	**|**	

M E M O R A N D U M

Broderick, J. **December 21, 1999**

Plaintiffs Betty Leung ("Ms. Leung") and Kevin Leung ("Mr. Leung") (collectively "Plaintiffs") filed a pro se complaint against Defendant SHK Management, Inc. t/a Korman Communities, Inc. ("Defendant" or "SHK") on June 29, 1998 alleging employment discrimination. Before the complaint was served upon Defendant, Plaintiffs, through counsel, filed an amended complaint on October 22, 1998. The amended complaint contains five counts on behalf of Ms. Leung under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., under the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("§1981"), under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq., and under the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951 et seq. The amended complaint also contains two counts on behalf of Mr. Leung under Title VII and the PHRA alleging discrimination of the basis of national origin. Both Plaintiffs are former employees of Defendant who claim that they were

terminated for discriminatory reasons.

Presently before the Court is Defendant's motion for summary judgement pursuant to Federal Rule of Civil Procedure 56 as to all counts of the amended complaint. Plaintiffs have filed a response thereto, Defendant has filed a reply, and Plaintiffs have filed a sur-reply. For the reasons stated below, the Court finds that there are no genuine issues of material fact and Defendant is entitled to judgment as a matter of law on all of the claims brought by Plaintiffs Betty Leung and Kevin Leung. Accordingly, the Court will grant Defendant's motion for summary judgment and enter judgment in its favor as to all counts of the amended complaint.

I. Background

In the amended complaint, Plaintiff Betty Leung alleges that Defendant discharged her from its employment on or about November 8, 1996 for discriminatory reasons. She alleges that she was replaced by a younger, white woman. Ms. Leung brings claims for discrimination on the basis of her national origin (Chinese) under Title VII (Count I), as well as under § 1981 (Count III), and under the PHRA (Count V). In addition, Ms. Leung brings a claim for discrimination on the basis of her age (40) under the ADEA (Count II). Finally, Ms. Leung claims that she suffered an adverse employment action in retaliation for taking medical leave for a serious medical condition, in violation of the FMLA (Count IV).

Mr. Leung claims that he was discharged by Defendant in April, 1996 for discriminatory reasons and replaced with a white male. Mr. Leung brings claims of discrimination on the basis of his national origin (Chinese) under Title VII (Count VI) and the PHRA (Count VII).

II. Summary Judgment Standard

In order to prevail on a summary judgment motion, the moving party must show from the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Court must accept the non-movant's version of the facts as true, and resolve conflicts in the non-movant's favor. Big Apple BMW, Inc. v. BMW of North American, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993).

A disputed factual matter is a genuine issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is material if it might affect the outcome of the lawsuit under the governing substantive law. Id.

Once the moving party establishes "that there is an absence of evidence to support the non-moving party's case," Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. The non-moving party may not rely on bare assertions, conclusory allegations or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). Neither may the non-moving party rest on the allegations in the pleadings. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Rather, the non-movant must then "make a showing sufficient to establish the existence of every element essential to his case, based on the

affidavits or by the depositions and admissions on file." Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992).

III. Statement of Facts

The following facts, taken from the pleadings and depositions provided by the parties, are undisputed: Ms. Leung began working for the Korman Company in 1985. B. Leung dep. at 22. Her supervisor at the Korman Company was John Bolger. B. Leung dep. at 67. In December, 1995 the Korman Company was dissolved and three new companies were formed to manage the properties that had previously been managed by the Korman Company. Hackenberg dep. at 10. One of the new companies formed in January, 1996 was SHK. Hackenberg dep. at 71. When SHK was formed in January, 1996, Ms. Leung joined that company as a bookkeeper in the treasury department. B. Leung dep. at 85. While Ms. Leung worked for Defendant, her supervisor was Craig Brunner, the Controller of SHK. B. Leung dep. at 179. Mr. Brunner's supervisor was William Hackenberg, Chief Financial Officer and Treasurer of SHK. Hackenberg dep. at 8. Prior to the formation of SHK in January, 1996 Ms. Leung had never worked with Craig Brunner or William Hackenberg. B. Leung dep. at 67. When Ms. Leung worked for Defendant she was responsible for completing bank reconciliations. B. Leung dep. at 71. Ms. Leung fell behind in completing these reconciliations and a temporary employee was hired to assist with these reconciliations. B. Leung dep. at 87-88, 139-140.

Defendant began seeking a replacement for Ms. Leung during the summer of 1996. Hackenberg dep. at 45. Ms. Leung took a medical leave in September 1996 in order to have surgery. Hackenberg dep. at 68. Mr. Brunner interviewed Patty Sommer in September, 1996.

Brunner dep. at 36. Mr. Brunner hired Ms. Sommer as a Staff Accountant. Hackenberg dep. at 47. Mr. Brunner sent Ms. Leung a letter dated October 1, 1996 notifying her that the company was hiring someone to replace her permanently and that the company would attempt to find her another position with SHK or another Korman Management company when she was ready to return to work. Pls. response at Ex. D. No other position was found for Ms. Leung and she was notified by letter that she was terminated effective November 8, 1996. Def. motion at Ex. H. The decision to terminate Ms. Leung was jointly made by Mr. Hackenberg and Mr. Brunner. Hackenberg dep. at 28, Brunner dep. at 15-16. Ms. Leung turned 40 years old on August 27, 1996. B. Leung dep. at 6-7.

Kevin Leung is the son of Betty Leung. K. Leung dep. at 4. Mr. Leung was hired by Craig Brunner in January, 1996 as a high school senior. K. Leung dep. at 13, 27. Mr. Leung worked for Defendant part-time as a file clerk, approximately six to twelve hours per week. K. Leung dep. at 13-14. Mr. Leung was never promised a job for a set period of time and most of the work he did involved filing documents and straightening the office following the creation of SHK. K. Leung dep. at 14, 27. In April, 1996, Mr. Leung was instructed, through his mother, not to come back to work unless Mr. Hackenberg told him to. K. Leung dep. at 78. Mr. Leung never again worked for Defendant. K. Leung dep. at 15. In mid-1996, Edmund Walsh, a college student, was hired by SHK as a part-time employee. Brunner dep. at 52-54.

IV. Discussion

A. Ms. Leung's Title VII claim

The Court will analyze Ms. Leung's PHRA claim under Title VII's legal standards. See

Griffiths v. Cigna Corp., 988 F.2d 457, 469 n. 10 (3d Cir. 1993). Similarly, Ms. Leung's § 1981 claim brought on the basis of alleged employment discrimination is analyzed according to the same legal framework, set forth below, used in Title VII cases. See Pamintuan v. Nanticoke Memorial Hosp., 192 F.3d 378, 385 (3d Cir. 1999). Thus, the foregoing discussion applies equally to all Ms. Leung's claims of national origin discrimination.

There are two avenues by which a plaintiff in a Title VII case may proceed. Where the plaintiff possesses direct evidence of discrimination, she may pursue a "mixed motives" case. See, e.g., Williams v. Greyhound Lines, Inc., No. Civ. A. 97-6997, 1998 WL 551981 at *3 (E.D.Pa. Aug. 11, 1998). In such a case, "if a plaintiff shows by direct evidence that an illegitimate criterion was a substantial factor in the decision, the burden of persuasion shifts to the employer to show that the decision would have been the same absent discrimination." Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1113 (3d Cir. 1997) (en banc) (citations omitted). This is the so-called Price Waterhouse method of proceeding. Id. Direct evidence required to meet the plaintiff's burden includes comments from a decisionmaker which tend to show state of mind but does not include "stray remarks in the workplace." Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

Where no such direct evidence of discrimination exists, the plaintiff may establish discrimination through circumstantial evidence using the burden-shifting analysis originally set forth by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and later developed in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). First, the plaintiff must set forth a prima facie case of discriminatory discharge, that is, the plaintiff must show: (1) she belongs to a

protected class; (2) she was qualified for the position; and (3) she was discharged under circumstances that give rise to an inference of unlawful discrimination. See Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 356-357 (3d Cir. 1999); Waldron v. SL Indus., Inc., 56 F.3d 491, 494 (3d Cir. 1995) . In order to make out a prima facie case of discrimination, the plaintiff need not prove that she was replaced by someone outside of the protected class. Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 347 (3d Cir. 1999). Once the plaintiff proves the elements of the prima facie case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its employment decision. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994) (citations omitted). "The employer need not prove that the tendered reason actually motivated its behavior, as throughout this burden-shifting paradigm the ultimate burden of proving intentional discrimination always rests with the plaintiff." Id. "Once the employer answers its relatively light burden of articulating a legitimate reason for the unfavorable employment decision, the burden of production rebounds to the plaintiff, who must now show by a preponderance of the evidence that the employer's explanation is pretextual...." Id.

In the instant case, Ms. Leung does not assert that she has direct evidence of discrimination which is sufficient to carry her burden of proof under a Price Waterhouse mixed motives approach. Even if Ms. Leung were to make such an assertion, however, the Court would have no trouble concluding that Ms. Leung has failed to bring forth sufficient direct evidence of discrimination to demonstrate that her national origin was a substantial factor in Defendant's decision to terminate her. The only evidence produced by Ms. Leung that could arguably be considered direct evidence of discrimination is the statement "they don't like Chinese" which Ms. Leung contends she overheard one employee make to another in the office on two occasions. B.

Leung dep. at 53-56. Ms. Leung does not allege that the employee who made this statement was a decisionmaker, nor does she allege that the statement that she allegedly overheard was related to the decision process which led to her termination. "Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision." Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 545 (3d Cir. 1992), cert. denied, 510 U.S. 826 (1993). Ms. Leung's assertion of a stray remark overheard between two employees, neither of whom were management-level, several months before the decision to terminate Ms. Leung was made, is not sufficient, even if Ms. Leung were able to lay a foundation for the admissibility of such statement, to constitute direct evidence under the Price Waterhouse standard.

Thus, the Court will analyze Ms. Leung's national origin discrimination claims under the McDonnell Douglas framework set forth above. As an initial matter, the Court assumes for the purpose of this motion that Ms. Leung has set forth a prima facie case of discriminatory discharge on the basis of her national origin. Ms. Leung, who is Chinese, is a member of a protected class. Ms. Leung worked for Defendant's predecessor corporation in the treasury department for more than ten years. Ms. Leung was terminated from her position.

Defendant argues that it is entitled to judgment as a matter of law because Ms. Leung cannot prove the elements of her prima facie case. Although Defendant concedes that Ms. Leung is a member of a protected class, Defendant argues both that Ms. Leung was not qualified for the position from which she was terminated and also that Ms. Leung was not replaced by someone outside of the protected class. Defendant's suggestion that Ms. Leung must prove, as an element of her prima facie case, that she was replaced by someone who is not a member of the protected

class has now been rejected by the United States Court of Appeals for the Third Circuit. Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 355 (3d Cir. 1999). As to Defendant's argument that Ms. Leung was not qualified for the position she held because Defendant was unhappy with her job performance, the Court believes that Defendant asks this Court to place too heavy a burden on plaintiff in setting forth the elements of a prima facie case. The "prima facie case under the McDonnell Douglas-Burdine pretext framework is not intended to be onerous." Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995). "While objective job qualifications should be considered in evaluating the plaintiff's prima facie case, the question of whether an employee possesses a subjective quality, such as leadership or management skill, is better left to consideration of whether the employer's nondiscriminatory reason for discharge is a pretext." Id. at 729 (internal quotation omitted). Defendant suggests both objective and subjective bases on which it alleges that Ms. Leung was not qualified for the position. However, "satisfactory performance of duties over a long period of time" when she performed the same job for Defendant's predecessor corporation is evidence which could be used by Ms. Leung to establish that she was qualified for the position she held with Defendant. Id. at 729. For purposes of this motion, the Court will presume that Ms. Leung has set forth all the elements of a prima facie case and proceed to consider whether or not Defendant has set forth a legitimate, nondiscriminatory basis for Ms. Leung's termination.

As a legitimate, nondiscriminatory basis for Ms. Leung's termination, Defendant asserts that Ms. Leung was terminated because of problems with her job performance. See, e.g., Hackenberg Memo dated July 16, 1996. Defendant asserts that almost as soon as she began working for Defendant it became obvious that Ms. Leung did not have the computer skills which

Defendant required for her position. Brunner dep. at 51-52, 56. Defendant also asserts that Ms. Leung did not complete the bank reconciliations for which she was responsible in a timely fashion and that an additional employee had to be hired in order to assist her. Brunner dep. at 18, 19, 23, 56. Defendant also asserts that there were persistent problems with Ms. Leung's work ethic such as her constant tardiness, her "wandering" around when she should be working, and excessive personal phone calls made while at work. Brunner dep. at 24-25, 48; Hackenberg dep. at 29-30. Defendant asserts that these performance problems were discussed with Ms. Leung but that she failed to take corrective action, despite being given an opportunity to do so. Brunner dep. at 18, 21-25, 49-52. Finally, Defendant asserts that a person with additional skills was needed so Defendant hired someone with more advanced computer skills and who had a four-year accounting degree. Brunner dep. at 17.

The Court finds that Defendant has thus produced evidence of a nondiscriminatory reason for Ms. Leung's termination to rebut the presumption of discrimination created by the prima facie case. See Sempier v. Johnson & Higgins, 45 F.3d 724, 730 (3d Cir. 1995). Through the deposition testimony of William Hackenberg, the Chief Financial Officer and Treasurer of Defendant, and Craig Brunner, Defendant's Controller and Ms. Leung's direct supervisor, Defendant asserts that Ms. Leung was unable to fulfill the essential job functions of the position for which she was hired and someone with additional skills was needed.

"[T]o defeat summary judgment when the defendant answers the plaintiff's prima facie case with legitimate, non-discriminatory reasons for its action, the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory

reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). In order to avoid summary judgment, "the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proferred reason is a pretext)." Id. (internal citations omitted). Disagreement with the employer's asserted reasons is not sufficient. As the Third Circuit has stated:

> To discredit the employer's proferred reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proferred legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence" and hence infer "that the employer did not act for the asserted non-discriminatory reasons."

Fuentes, 32 F.3d at 765 (quoting Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 638 (3d Cir. 1993)) (internal citations omitted). The "question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is discrimination." Keller v. Orix Credit Alliance, 130 F.3d 1101, 1109 (3d Cir. 1997) (en banc). Put simply, the plaintiff "must show, not merely that the employer's proferred reason was wrong, but that it was so plainly wrong that if cannot have been the employer's real reason." Keller, 130 F.3d at 1109.

Ms. Leung asserts the following evidence, based upon which she alleges a reasonable factfinder could determine that Defendant's assertions of her poor job performance were a pretext for discrimination: Ms. Leung, although she concedes that the bank reconciliations were several months behind, disputes that this was a result of her poor job performance. B. Leung dep. at 69,

87-88. Ms. Leung also contends that she was never made aware of any problems with her performance and that, on a few occasions, she was told by her supervisor, Craig Brunner, that she did a good job on something. B. Leung dep. at 87, 126, 138-139, 180-181, 236. Ms. Leung contends that she was replaced by a white woman with less experience. B. Leung dep. at 76, 125-126. Ms. Leung also contends that statements were made in the office which are evidence of discriminatory animus against Chinese by management employees of Defendant. B. Leung dep. at 53, 56, 62-63, 118-120, 175, 191. Finally, Ms. Leung contends that the fact that no one sent her a card or flowers or called her after she had surgery is evidence that she was not treated equally. B. Leung dep. at 207-208.

The Court finds that the evidence brought forth by Ms. Leung, either individually or taken as a whole, viewed in the light most favorable to Ms. Leung as the non-moving party, is insufficient to raise a genuine issue of material fact as to whether or not Defendant's asserted reason for her termination was a pretext for discrimination. Initially, the Court finds that Ms. Leung has not brought forth evidence to rebut Defendant's claim of her poor job performance. Ms. Leung admits that the bank reconciliations, for which she was responsible, were several months behind. Ms. Leung also does not dispute that she did not know how to perform the computer tasks which Defendant asked her to perform. Rather, Ms. Leung argues that the problem with the bank reconciliations was not her fault because she was not supposed to have to perform all of them herself. Ms. Leung also argues that she performed her job well, was told that she performed her job well on a few occasions and that her performance and work ethic were never criticized.

The law is clear that as long as an employer does not discriminate, an employer may rely

on subjective criteria in deciding whether or not to terminate an employee. See Ezold v. Wolf , Block, Schorr & Solis-Cohen, 983 F.2d 509, 527 (3d Cir. 1993). The fact that an employer relied on a particular area where an employee is deficient in making the decision to terminate an employee, ignoring many areas where the employee excels, is not evidence of discrimination unless the plaintiff can show that other similarly situated employees were judged according to different criteria. Ezold, 983 F.2d at 528. Ms. Leung has not brought forth any evidence that other employees of Defendant who experienced performance problems similar to hers were treated differently.

Ms. Leung's contention that she was not criticized for her allegedly poor performance prior to her termination is similarly not sufficient to demonstrate that Defendant's assertion of poor performance is a pretext for discrimination. "Employers who are dissatisfied with the performance of their employees sometimes voice express criticism to those employees, but employers do not always do so." Keller v. Orix Credit Alliance, 130 F.3d 1101, 1111 (3d Cir. 1997) (en banc). "The company is under no obligation to warn plaintiff of complaints regarding [her] performance and, if anything, the effect of such evidence is equivocal, perhaps indicating that plaintiff was receiving the benefit of the doubt." Healy v. New York Life Ins. Co., 860 F.2d 1209, 1216 (3d Cir. 1988). Evidence of a lack of criticism may become important if the plaintiff can show that, in this respect, she was treated differently than other similarly situated employees. Keller, 130 F.3d at 1111. The record demonstrates that Defendant did not have a system for formally warning employees of poor job performance, but it was the practice of Craig Brunner, Ms. Leung's supervisor, to handle these matters verbally with the employee. Hackenberg dep. at 30; Brunner dep. at 41. Ms. Leung has brought forth no evidence to suggest that she was treated

differently from other similarly situated employees in this respect. To the extent that Ms. Leung also suggests that the lack of prior criticism or documentation of poor job performance is sufficient to show pretext because it suggests that the allegations of her poor performance are a post hoc rationalization, this contention is not supported by the evidence. The record contains uncontradicted testimony from Mr. Hackenberg and Mr. Brunner regarding their dissatisfaction with Ms. Leung's job performance as of February, 1996. Further, the Court has been provided with a copy of a memorandum dated July 16, 1996, prepared by Mr. Hackenberg, which details the problems with Ms. Leung's job performance and the company's intention to fire her as soon as possible. Ms. Leung was not terminated until November, 1996.

Similarly, the fact that Ms. Leung believes that she performed her job functions adequately or that she was praised on more than one occasion for elements of her job performance is not sufficient to demonstrate that Defendant's assertions of poor job performance are a pretext for unlawful discrimination. The plaintiff's "view of [her] job performance is not at issue; what matters is the perception of the decision maker." Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991). "Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations." Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 528 (3d Cir. 1992). "The employee's positive performance in another category is not relevant, and neither is the employee's judgment as to the importance of the stated criterion." Simpson v. Kay Jewelers, Division of Sterling, Inc., 142 F.3d 639, 647 (3d Cir. 1998). The Court does not choose what job performance factors it considers important or determine what weight should be assigned to particular factors. Id. Rather, to show pretext, the plaintiff must point to evidence that she

satisfied the job criterion the employer has stated it considered important or that the employer did not actually rely upon the stated criterion. Id. Ms. Leung has done neither.

Finally, Ms. Leung asserts that she was not treated equally by employees of Defendant. Ms. Leung alleges that Kathy Thompson, a fellow employee, would sometimes walk away from the conversation if Ms. Leung came up. B. Leung dep. at 61. Ms. Leung also asserts that she was not sent a card or flowers after she had her surgery, but that this would be done for other people. B. Leung at 208. The Court finds that this evidence does not demonstrate pretext. Although the incidents Ms. Leung alleges may be evidence of poor treatment by her co-workers, Ms. Leung has not provided any evidence that she was treated unequally by decision makers at the company on the basis of her national origin. Ms. Leung does not assert that decision makers of the company were involved in these incidents or that they were even aware of them.

Ms. Leung also asserts that comments were made in the office which are evidence of discriminatory animus on the basis of national origin. Ms. Leung asserts that on "a couple of occasions" she heard Kathy Thompson, a fellow employee, say that "they don't like Chinese." B. Leung dep. at 56, 63, 116-118. Ms. Leung asserts that "they" is "upper management." B. Leung dep. at 116-118. Ms. Leung admits, however, that she never heard anyone refer to upper management specifically. B. Leung dep. at 56, 62-65. Nor did she hear any more of the conversation. B. Leung dep. at 63. Ms. Leung never questioned anyone about the statement. B. Leung dep. at 64. Emily Bradigan, who Ms. Leung alleges was present when the statement was made, testified that she never heard anyone at SHK say "they don't like Chinese" except, perhaps, in connection with a lunch order. Bradigan dep. at 21. Ms. Leung also alleges that on one occasion Mr. Hackenberg, in response to seeing Ms. Leung's husband standing in the office

kitchen, asked whether or not Ms. Leung's whole family worked for the company now. B. Leung dep. at 175. Ms. Leung asserts that this remark, which was made in January, 1996, was made not as a joke, but sounded to her like something that Mr. Hackenberg was worried about. B. Leung dep. at 175.

The Court finds that Ms. Thompson's statement may not be considered in a motion for summary judgement because it would not be admissible into evidence at trial. See Philbin v. Trans Union Corp., 101 F.3d 957, 960 n.1 (3d Cir. 1996). The statement constitutes double hearsay within the meaning of Federal Rule of Evidence 805. See Carden v. Westinghouse Elec. Corp., 850 F.2d 996, 1002 (3d Cir. 1988). Rule 805 provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Fed. R. Evid. 805. Ms. Thompson is alleged to have said that "they" don't like Chinese. Thus, "it is evident that someone (who has never been identified in the record) said something to [Thompson] which [she, Thompson], in turn repeated." Carden, 850 F.2d at 1002. In order for the statement to be admissible, therefore, there must be a basis not only for admitting Ms. Thompson's statement but also the statement that "they" made. Carden, 850 F.2d at 1002. Ms. Leung has not drawn the Court's attention to any exception to the hearsay rule which would permit the introduction into evidence of what "they" said. Carden, 850 F.2d at 1002. Ms. Leung has the burden of establishing a foundation which would identify the "they" about whom Ms. Thompson was speaking. Carden, 850 F.2d at 1002. Ms. Leung has not done so. Ms. Leung has also not drawn the Court's attention to any exception to the hearsay rule which would permit the introduction of Ms. Thompson's statement, even if no second level of hearsay were involved. Ms. Thompson, the woman who is alleged to have made

the statement, is Mr. Hackenberg's secretary. B. Leung dep. at 194. Ms. Leung does not provide evidence that Ms. Thompson made the statement as an agent of the company. Nor does she suggest that Ms. Thompson was a decision maker regarding Ms. Leung's employment with Defendant. Therefore, based upon the record before it, the Court finds that admission of this statement would be error and thus, the Court may not rely on the statement in ruling on the motion for summary judgment. See Pamintuan v. Nanticoke Memorial Hosp., 192 F.3d 378, 384 n. 13 (3d Cir. 1999) (stating that evidence which would not be admissible at trial cannot properly be considered on a motion for summary judgment).

Mr. Hackenberg's statement is not sufficient to demonstrate that the Defendant's asserted reasons for Ms. Leung's termination, namely her poor job performance, was a pretext for unlawful discrimination. Similarly, even if Ms. Thompson's statement was admissible, it would not demonstrate that the Defendant's asserted reason for terminating Ms. Leung was a pretext for discrimination. "Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of the decision." Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 545 (3d Cir. 1992); see also Pivirotto v. Innovative Systems, Inc., 191 F.3d 344, 359 (3d Cir. 1999); Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 333 (3d Cir. 1995). It is undisputed that Ms. Thompson's statement was one made by a non-decisionmaker. There is also no evidence that Mr. Hackenberg's statement was one related to the decision process which led to Ms. Leung's termination. In addition, the comment was allegedly made in January 1996, more than ten months before Ms. Leung was terminated. See Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1111 (3d Cir. 1997) (en banc) (finding comment by decision maker made five months

before plaintiff was fired was not sufficient to prove pretext). A single, ambiguous remark by a decisionmaker is not sufficient to meet Ms. Leung's burden of proving pretext. See Joseph v. First Judicial District of Penna., No. Civ. A. 97-6703, 1999 WL 79056 at *5 (E.D.Pa. Feb. 2, 1999).

The Court has determined that the evidence presented by Ms. Leung, taken as a whole and construed in the light most favorable to Ms. Leung as the non-moving party, could not reasonably be viewed as sufficient to prove by a preponderance of the evidence that animus on the basis of her national origin was a motivating or determinative cause of Ms. Leung's termination or as sufficient for a factfinder to disbelieve Defendant's asserted reason for Ms. Leung's termination. Therefore, the Court will grant summary judgment against Plaintiff Betty Leung and in favor of Defendant SHK Management on Ms. Leung's national origin discrimination claims contained in Counts I, III, and V of the amended complaint.

B. Mr. Leung's Title VII claim

As previously noted, the same legal standard applies to claims under the PHRA as those under Title VII. See Griffiths v. Cigna Corp., 988 F.2d 457, 469 n. 10 (3d Cir. 1993). Thus, the Court will analyze all of Mr. Leung's claims under the McDonnell-Douglas framework applicable to Title VII cases set forth in detail above.

Mr. Leung, who is Chinese, is a member of a protected class. It is undisputed that he was qualified for the position of part-time file clerk which he held. Defendant argues, however, that Mr. Leung cannot set forth the final element of the prima facie case because his position was eliminated and he was not replaced. In order to make out a prima facie case of discrimination,

the plaintiff need not prove that he was replaced by someone outside of the protected class. Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 347 (3d Cir. 1999). The Court presumes for the purpose of this motion that Mr. Leung has set forth a prima facie case of discriminatory discharge and will proceed to consider whether or not Defendant has set forth a legitimate, nondiscriminatory basis for Mr. Leung's termination.

Defendant asserts that Mr. Leung was terminated because his job was eliminated. Brunner dep. at 14. Defendant asserts that Mr. Leung was hired as a part-time, temporary employee to assist office staff with filing and setting up the office after SHK was created in January, 1996. K. Leung dep. at 13-14, 27; Brunner dep. at 12; Hackenberg dep. at 20-22. Defendant asserts that Mr. Leung was asked not to return when this work was done. Brunner dep. at 14.

The Court finds that Defendant's asserted reason for Mr. Leung's termination satisfies Defendant's relatively light burden of setting forth a legitimate, nondiscriminatory reason for its employment decision. The Court will thus proceed to examine the evidence which Mr. Leung asserts is evidence that Defendant's asserted reason is a pretext for unlawful discrimination based on his national origin.

Mr. Leung asserts the following evidence, based upon which he alleges a reasonable factfinder could determine that Defendant's asserted reason for his termination is a pretext for discrimination: Mr. Leung claims that he was treated differently from the child of another employee who also worked in the office. K. Leung dep. at 16-18, 20. Mr. Leung claims that he was replaced by a white male named Edmund Walsh and that Edmund Walsh was treated in a more favorable way by Defendant. K. Leung dep. at 38, 60-61, 70. Mr. Leung also asserts that

no one ever told him why he was asked not to come back. K. Leung dep. at 38, 59.

The Court finds that the evidence brought forth by Mr. Leung, either individually or taken as a whole, viewed in the light most favorable to Mr. Leung as the non-moving party, is insufficient to raise a genuine issue of material fact as to whether or not Defendant's asserted reason for his termination was a pretext for discrimination. As an initial matter, Mr. Leung has failed to bring forth evidence to rebut Defendant's assertion that the job for which Mr. Leung was hired was eliminated. In fact, Mr. Leung testified that he knew the reorganization was complete in April, 1996 and the work was done. K. Leung dep. at 27. Mr. Leung insists that there was other work that he could have done. K. Leung dep. at 60. Mr. Leung bases this assertion solely on information provided to him by his mother, Plaintiff Betty Leung, that another part-time employee, Edmund Walsh, was hired. K. Leung dep. at 60-61. The evidence before the Court, however, is that Edmund Walsh was a temporary employee who was hired to work on the computer system which was put in place after SHK was created. Hackenberg dep. at 24, 43; Brunner dep. at 52. During the period of Mr. Walsh's employment with SHK he worked a full 37-and-a-half hour week. Brunner dep. at 53. Mr. Walsh was a college student, not a high school student like Mr. Leung. Brunner dep. at 53. There is no testimony from Mr. Leung that he ever worked on the computer system or that he would be qualified to do so. Similarly, there is no evidence, other than the hearsay testimony by Mr. Leung as to what his mother told him, that Mr. Walsh's job was not primarily involved with the computer system.

The Court finds that the other evidence proffered by Mr. Leung is also insufficient to show pretext. Although Mr. Leung asserts that Kathy Thompson, a secretary at the office, treated him differently because she often gave him assignments through his mother rather than speaking

to him directly, Mr. Leung has failed to demonstrate how this behavior was related to his alleged termination. Mr. Leung was not hired or fired by Ms. Thompson and there is no evidence that Ms. Thompson's behavior, even if it were evidence of discriminatory animus, was related to the decision to terminate Mr. Leung. Similarly, the fact that Mr. Leung believes that Ms. Thompson spoke to him in a less friendly manner than she did the daughter of another employee who also worked at the office is not relevant to Mr. Leung's termination and thus is not evidence of pretext.

Likewise, the Court rejects Mr. Leung's assertion that the fact that Mr. Walsh was given a party when he left and was given business cards while he worked for Defendant is evidence of disparate treatment sufficient to show that Defendant's asserted reason for Mr. Leung's termination is a pretext for discrimination. The record demonstrates that Mr. Walsh occupied a different position at SHK than did Mr. Leung. Thus, Mr. Walsh is not a similarly situated employee. Even if the Court were to consider Mr. Walsh a similarly situated employee, however, Mr. Leung has failed to demonstrate that Mr. Walsh was treated differently than Mr. Leung in terms of reassignment to a different type of work after the work for which they were admittedly hired was complete. Mr. Leung admits that the work he was hired to do was complete in April, 1996. Mr. Leung has not provided the Court with any evidence to suggest that Mr. Walsh was retained by the company after the work he was hired to do was complete. Mr. Leung has, therefore, failed to establish that Mr. Walsh was a similarly situated employee who was treated differently. Thus, the treatment of Mr. Walsh by SHK upon which Mr. Leung relies is not sufficient to establish pretext.

Finally, Mr. Leung complains that he was never given an explanation for his termination.

Mr. Leung has not explained to the Court how this lack of an explanation demonstrates that Defendant's action was a pretext for illegal discrimination. As previously discussed, an employer may terminate an employee for any reason at all as long as it is not a discriminatory one. Mr. Leung has directed the Court to no authority, and the Court is aware of none, which suggests that an employer is under an obligation to inform the employee of the reason for his termination and that an employer's failure to do so is evidence of unlawful discrimination. Defendant's alleged failure to inform Mr. Leung of why he was no longer needed by the company is not, on the record before the Court, evidence of pretext.

The Court has determined that the evidence presented by Mr. Leung, taken as a whole and construed in the light most favorable to Mr. Leung as the non-moving party, could not reasonably be viewed as sufficient to prove by a preponderance of the evidence that animus on the basis of his national origin was a motivating or determinative cause of Mr. Leung's termination or as sufficient for a factfinder to disbelieve Defendant's asserted reason for Mr. Leung's termination. Therefore, the Court will grant summary judgment against Plaintiff Kevin Leung and in favor of Defendant SHK Management on Mr. Leung's national origin discrimination claims contained in Counts VI and VII of the amended complaint.

C. Ms. Leung's claim under the ADEA

Although the McDonnell Douglas burden-shifting framework was originally developed in Title VII cases, the same analysis applies to cases brought under the ADEA as well. Waldron v. SL Indus., Inc., 56 F.3d 491, 494 n.4 (3d Cir. 1995). Similarly, an ADEA plaintiff may proceed under a Price Waterhouse "mixed motives" theory as well. See Keller v. Orix Credit Alliance,

130 F.3d 1101, 1113 (3d Cir. 1997) (en banc). In the instant case, since Ms. Leung has not asserted any direct evidence of discrimination based on her age and the record reveals none, the Court will address Ms. Leung's claims under the Mc Donnell Douglas burden-shifting framework set forth above.

In order to prove a prima facie case of discriminatory discharge based on age, a plaintiff must show: (1) she was a member of a protected class, i.e. at least 40 years of age; (2) she was qualified for the position she held; and (3) that she was replaced by a sufficiently younger person to create an inference of discrimination. See Simpson v. Kay Jewelers, 142 F.3d 639, 644 n.5 (3d Cir. 1998). A plaintiff in an ADEA case need not demonstrate that she was replaced by someone outside the protected class as an element of her prima facie case. See O'Connor v. Consolidated Coin Caterers Corp., 527 U.S. 308, 311 (1996). Although Defendant argues that the plaintiff must also demonstrate that the employer knew that the plaintiff was a member of the protected class, this suggestion is not supported by law. Geraci v. Moody-Tottrup, Int'l, Inc., 82 F.23 578, 581 (3d Cir. 1996) ("The traditional McDonnell Douglas-Burdine presumption quite properly makes no reference to the employer's knowledge of membership in a protected class because, in the vast majority of discrimination cases, the plaintiff's membership is either patent (race or gender), or is documented on the employee's personnel record (age).")

Ms. Leung was 40 years old at the time she was terminated so she is a member of the protected class. Ms. Leung worked for Defendant's predecessor in the treasury department for more than ten years. Ms. Leung was terminated by Defendant. The Court presumes for the purpose of this motion that Ms. Leung has set forth a prima facie case of discriminatory discharge and will proceed to consider whether or not Defendant has set forth a legitimate,

nondiscriminatory basis for Ms. Leung's termination.

Defendant asserts, as has been previously discussed, that Ms. Leung was terminated because of documented poor job performance. The Court has previously found that this is a legitimate, nondiscriminatory reason for Ms. Leung's termination. The Court has already rejected, in connection with Ms. Leung's national origin discrimination claim, Ms. Leung's asserted evidence of pretext.

As additional evidence of discriminatory animus based on her age, Ms. Leung asserts that she was fired shortly after her 40th birthday and replaced by a woman in her 20s. Defendant contends that Ms. Leung was not in fact replaced by Patty Sommer because Patty Sommer filled a position that had additional responsibilities. Brunner dep. at 51-52; Hackenberg dep. at 84. Defendant asserts that Ms. Sommer had additional job qualifications which Ms. Leung did not have. Ms. Leung has not brought forth evidence to contradict Defendant's assertions. The evidence before the Court is that Ms. Sommer had a four-year college degree, which Ms. Leung did not have, and had computer skills which Ms. Leung did not have. Hackenberg dep. at 48-49, 84; Brunner dep. at 32-33. Defendant asserts that Ms. Leung was terminated for lacking necessary job skills. Brunner dep. at 17. Thus, even if the Court were to find that Ms. Sommer did in fact replace Ms. Leung, Ms. Leung has brought forth no evidence from which a reasonable factfinder could find that Defendant's action in firing Ms. Leung and replacing her with a person with better skills who was given additional responsibilities was a pretext for discrimination based on Ms. Leung's age. The record shows, in fact, that the decision to terminate Ms. Leung was made in July, 1996, based upon the documented problems with her job performance set forth above, a month before Ms. Leung turned 40. Hackenberg Memo dated July 16, 1996. Ms.

Leung's termination was delayed because Defendant needed someone to remain in her position while the company underwent a computer conversion. Hackenberg Memo dated July 16, 1996.

The Court has determined that the evidence presented by Ms. Leung, taken as a whole and construed in the light most favorable to Ms. Leung as the non-moving party, could not reasonably be viewed as sufficient to prove by a preponderance of the evidence that animus on the basis of her age was a motivating or determinative cause of Ms. Leung's termination or as sufficient for a factfinder to disbelieve Defendant's asserted reason for Ms. Leung's termination. Therefore, the Court will grant summary judgment against Plaintiff Betty Leung and in favor of Defendant SHK Management on Ms. Leung's age discrimination claim contained in Count II of the amended complaint.

D. Ms. Leung's claim under the FMLA

FMLA claims of retaliatory discharge are analyzed according to the legal framework established for Title VII claims. See Baltuskonis v. US Airways, Inc., 60 F. Supp. 2d 445, 448 (E.D.Pa. 1999) (citing Churchill v. Star Enterprises, 183 F.3d 184 (3d Cir. 1999)). Thus, where, as here, the plaintiff does not have direct evidence of discrimination, claims of retaliatory discharge under the FMLA are analyzed under the McDonnell Douglas burden-shifting framework set forth above. See Baltuskonis, 60 F. Supp. 2d at 448; Voorhees v. Time Warner Cable Nat'l Div., No. Civ. A. 98-1460, 1999 WL 673062 at *4 (E.D.Pa. Aug. 30, 1999); Holmes v. Pizza Hut of America, Inc., No. Civ. A. 97-4967, 1998 WL 564433 at *7 (E.D.Pa. Aug. 31, 1998). In order to prove a prima facie case of retaliation, a plaintiff must show that: (1) she is protected under the FMLA; (2) she suffered an adverse employment action; and (3) that a causal

connection exists between the adverse employment action and the plaintiff's exercise of her rights under the FMLA. See Baltuskonis, 60 F. Supp. 2d at 448; Voorhees, 1999 WL 673062 at *6

Defendant alleges that it is entitled to judgment as a matter of law on Ms. Leung's FMLA claim because Ms. Leung is not an "eligible employee" under the FMLA. The FMLA provides, in relevant part:

> (2) Eligible employee
> (A) In general
> The term "eligible employee" means an employee who has been employed--
> (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and
> (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

28 U.S.C. § 2611. Ms. Leung began working for Defendant's predecessor, Korman Company, in 1982. B. Leung dep. at 22. Ms. Leung worked for Korman Company continuously until she began working for SHK Management in January 1996, when Korman Company was dissolved and SHK Management was formed. B. Leung dep. at 44-45. Ms. Leung went out on medical leave in September 1996 to have surgery. Hackenberg dep. at 68. Based upon these facts, Defendant argues that Ms. Leung was not an eligible employee under the FMLA because she had only worked for Defendant for a period of nine months at the time she took her medical leave. Defendant does not otherwise contest Ms. Leung's eligibility for FMLA leave.

In response, Ms. Leung asserts that she is an eligible employee because Defendant is a "successor in interest" to her former employer, Korman Company, under the regulations provided in 29 C.F.R. § 825.107. Ms. Leung asserts that the two companies had substantial continuity of business operations because Defendant provides similar real estate management services to those previously provided by Korman Company. Hackenberg dep. at 71. The offices of Defendant are

located within the same building previously occupied by Korman Company. B. Leung dep. at 44; Hackenberg dep. at 70. Defendant did not adopt its own personnel policies at the time it was created, choosing instead to abide by personnel policies "grandfathered" from Korman Company. Hackenberg dep. at 30-31. When Ms. Leung was terminated by Defendant she was provided with ten (10) weeks severance pay because she was "an over ten (10) year employee." Brunner letter dated Nov. 1, 1996.

For the purpose of this motion, the Court presumes that Ms. Leung was an eligible employee under the FMLA. The parties do not dispute that Ms. Leung suffered an adverse employment. In order to complete her prima facie case, Ms. Leung must prove that a causal connection exists between her taking of medical leave and the decision to fire her. A reasonable factfinder could find that "[t]he sheer proximity in time between [Ms. Leung's] FMLA leave and termination establishes the necessary causal connection." Baltuskonis v. US Airways, Inc., 60 f. Supp. 2d 445, 448 (E.D.Pa. 1999); see also Voorhees v. Time Warner Cable Nat'l Div., No. Civ. A. 98-1460, 1999 WL 673062 at *6 (E.D.Pa. Aug. 30, 1999). Therefore, the Court will presume for the purpose of this motion that Ms. Leung has proved all the element of a prima facie case of retaliation under the FMLA.

As has been previously discussed, Defendant contends that Ms. Leung was terminated for documented poor job performance. The Court has previously found that Defendant has set forth legitimate, non-discriminatory reason for Ms. Leung's termination and Ms. Leung has not adduced any evidence on her FMLA claim which would require a contrary conclusion. Ms. Leung, as the Court has previously found in the context of Ms. Leung's national origin and ADEA claims, has not come forward with sufficient evidence to show that Defendant's asserted

reasons for terminating her are a pretext for unlawful discrimination. Although the temporal proximity of Ms. Leung's leave and her termination is "relevant for determining whether the causal element of the prima facie case has been established, [Ms. Leung] failed to demonstrate its relevancy to the showing of pretext requirement." Baltuskonis v. US Airways, Inc., 60 F. Supp. 2d 445, 449 (E.D.Pa. 1999). The record shows, in fact, that the decision to terminate Ms. Leung was made in July, 1996, based upon the documented problems with her job performance set forth above, two months before Ms. Leung took her medical leave. Hackenberg Memo dated July 16, 1996. Ms. Leung's termination was delayed because Defendant needed someone to remain in her position while the company underwent a computer conversion. Hackenberg Memo dated July 16, 1996.

The Court concludes on the basis of the record before it that Ms. Leung cannot show pretext because she would have been terminated for poor job performance even if she hadn't taken protected leave. See Holmes v. Pizza Hut of America, Inc., No. Civ. A. 97-4967, 1998 WL 564433 at *7 (E.D.Pa. Aug. 31, 1998). The Court therefore finds that Defendant is entitled to judgment as a matter of law on Ms. Leung's claim that she was unlawfully discharged in retaliation for taking medical leave under the FMLA because Ms. Leung has not brought forth evidence from which a factfinder could reasonably disbelieve Defendant's articulated reasons for terminating Ms. Leung or which would allow a factfinder to believe that retaliation was more likely than not a motivating or determinative cause of Defendant's termination of Ms. Leung. To the extent that Ms. Leung also seeks to raise a claim for ineffective notice of her rights under the FMLA, the Court finds that Ms. Leung cannot sustain such a claim because she has brought forth no evidence as to how she suffered any injury from the allegedly defective notice. See Voorhees

v. Time Warner Cable Nat'l Div., No. Civ. A. 98-1460, 1999 WL 673062 at *8 (E.D.Pa. Aug. 30, 1999). Therefore, the Court will grant summary judgment in favor of Defendant SHK Management and against Plaintiff Betty Leung on Ms. Leung's FMLA claim contained in Count IV of the amended complaint.

V. Conclusion

For the foregoing reasons, the Court finds that there are no genuine issues of material fact and Defendant is entitled to judgment as a matter of law on all of the claims brought by Plaintiffs Betty Leung and Kevin Leung. Therefore, the motion of Defendant SHK Management pursuant to Federal Rule of Civil Procedure 56 will be granted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BETTY LEUNG and KEVIN LEUNG	**CIVIL ACTION**
	NO. 98-3337
v.	
SHK MANAGEMENT, INC. t/a KORMAN COMMUNITIES, INC.	

ORDER

AND NOW, this 21st day of December, 1999; Defendant SHK Management having filed a motion for summary judgment and Plaintiffs Betty Leung and Kevin Leung having filed a response thereto; for the reasons stated in this Court's Memorandum of this same date, the Court having determined that there are no genuine issues of material fact and Defendant is entitled to judgment as a matter of law on all claims brought by Plaintiffs Betty Leung and Kevin Leung;

IT IS ORDERED that Defendant's Motion for Summary Judgment (Document No. 19) is **GRANTED**.

RAYMOND J. BRODERICK, J.